Filed 5/1/12 P. v. Kennedy CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE KENNEDY, Defendant and Appellant.	B221864 (Los Angeles County Super. Ct. No. MA026253)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Christopher Lee Kennedy appeals from a judgment of conviction entered after a jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a)) and found true the allegations that the murder was committed by means of lying in wait, and during the course of a robbery and kidnapping (*id*., § 190.2, subds. (a)(15), (17)). Defendant was also found guilty of conspiracy to commit a crime (*id*., § 182, subd. (a)(1)), with the jury finding one or more of the alleged overt acts to be true. In addition, the jury found him guilty of robbery (*id*., § 211), kidnapping to commit a crime (*id*., § 209, subd. (b)(1)), and arson causing great bodily injury (*id*., § 451, subd. (a)). Defendant admitted the truth of the two prior strike convictions (*id*., §§ 667, subds. (b)-(i), 1170.12). The jury deadlocked as to penalty, and the People ultimately elected not to retry the penalty phase of the trial.

The trial court sentenced defendant to life without the possibility of parole for the murder and imposed a concurrent indeterminate term of 25 years to life in prison for the conspiracy. It imposed a concurrent indeterminate term of 15 years to life in prison for the kidnapping and a concurrent term of nine years for the arson causing great bodily injury, and it stayed a determinate term of three years for the robbery.[1]

On appeal, defendant contends the trial court erred in admitting the statements of Ronald Kupsch[2] and admitting evidence of racist gangs. We find no error and affirm.

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1 Codefendant Valerie Martin was charged with the same crimes and tried before a separate jury. She was found guilty of first degree murder, and the special circumstance allegations were also found to be true. The jury also found as the overt act of the conspiracy that defendant participated in the killing.

2 Kupsch was tried separately and his conviction was affirmed in an unpublished opinion (*People v. Kupsch* (Nov. 3, 2010, B218426) [nonpub. opn.]).

FACTS

A. *Prosecution*

In February 2003, William Whiteside (Whiteside) was living in a mobile home with Valerie Martin (Martin), her son Ronald Kupsch (Kupsch), and Kupsch's girlfriend, Jessica Buchanan (Buchanan). Whiteside was half Black and half Native American, and defendant was an aspiring member of a White supremacist gang called Metal Mindz. He had White supremacist tattoos on his neck and leg. Buchanan was a Metal Mindz member, and Kupsch was also an aspiring member.

On February 27, 2003, defendant, Martin, Kupsch, Buchanan and Bradley Zoda (Zoda)[3] were at Whiteside's trailer when Martin mentioned that she owed someone $300 for drugs. The group discussed options to repay the debt, including stealing cars. During the discussion, Kupsch, Martin and Zoda ingested methamphetamine. At some point, defendant said they intended to "rob Valerie's old man" and would "jump him" in the hospital parking lot. Zoda agreed to help, assuming that he, defendant, and Kupsch would attack Whiteside with their fists.

Martin drove defendant, Kupsch and Zoda to the parking lot of Antelope Valley Hospital, where Martin and Whiteside both worked. Whiteside worked the 3:30 p.m. to midnight shift as an "Environmental Service Aide" who did housekeeping and maintenance. Upon seeing Whiteside's car, the group decided that the car was in too visible a location to wait for Whiteside there. Martin suggested an alternate plan. Martin dropped the others off at Sean Smith's (Sean)[4] trailer in Lancaster. Before leaving, Martin indicated she would call Whiteside and ask him to pick them up at Sean's trailer. While at Sean's trailer, defendant, Kupsch and Zoda ingested methamphetamine.

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[3] Zoda was a Metal Mindz member.

[4] Sean Smith was a Metal Mindz member or associate. We refer to him by his first name to avoid any confusion with Stewart Smith.

When Whiteside arrived, all three men got into his car. They beat Whiteside until he was unconscious. Defendant took Whiteside's wallet. Defendant and Kupsch put Whiteside in the car's trunk. Defendant drove away from Sean's trailer. Later, Whiteside opened the trunk. Defendant stopped the car. Kupsch got out, struck Whiteside, closed the trunk, and got back in the car. Defendant started driving again, but stopped when Whiteside again opened the trunk. Defendant and Kupsch used bats to beat Whiteside and then got back in the car. Defendant told Kupsch to call Martin. Kupsch did so and directed her to bring gasoline.

Martin met the men. Defendant took a can of gasoline out of Martin's car and poured it onto Whiteside's car. Before he finished pouring, the gasoline ignited and burned defendant. The men got into Martin's car, and she drove them to Whiteside's trailer. They took off their clothes and placed them in a trash bag. After awhile, defendant, Kupsch, Zoda and Buchanan went to defendant's residence.

On the way to his residence, defendant called his mother and asked her to move her car out of the garage so that they could park inside. A few hours later, sheriff's deputies, including defendant's uncle, arrested defendant and left.[5] At the time of his arrest, defendant had burns on his legs and hand.

After defendant was arrested, Martin, Kupsch, Zoda and Buchanan drove to Rebecca King's (King) home in a nearby trailer park. King lived in the trailer with her boyfriend, Donovan Casey (Casey). Casey was the founder and leader of the Metal Mindz. Kupsch told Casey that he, defendant and Zoda had beaten Martin's boyfriend with baseball bats, put him in the car's trunk, and set the car on fire. Later the same day, Martin, Kupsch and Casey went to multiple ATMs. Kupsch withdrew money from Whiteside's account and gave some of the money to Martin and some to Casey. In total, $500 was withdrawn from Whiteside's account on February 28, 2003.

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[5] Defendant was arrested for a parole violation.

A few days later, Stewart Smith (Smith) was with Kupsch and Zoda when Zoda put a bag in a dumpster and set it on fire. Before the fire, Zoda removed a pair of black DC sneakers. They then went to Whiteside's trailer. Close to midnight, Smith said they should leave because Whiteside would be home soon. Kupsch said that he, defendant and Zoda had killed Whiteside, beating him with clubs, putting him in the car's trunk, and setting it on fire. Zoda needed a new pair of shoes and began wearing the black sneakers that Kupsch had been wearing on the night of the murder.

On February 28, 2003, a passerby spotted Whiteside's car. A lighter and a bat were found near the vehicle. Inside the trunk, Whiteside's remains were discovered. Much of the body had been burned. A partially melted aluminum bat was recovered from the floorboard. An autopsy was conducted and the immediate cause of death was determined to be smoke inhalation and burns to the body. The secondary cause of death was blunt force trauma to the head.

Zoda was arrested on March 10, 2003, for possession of a weapon. At the time of his arrest, he was wearing the shoes he had gotten from Kupsch. Smith was at Zoda's house and attempted to flee but was also arrested.

On March 10, 2003, police conducted an audiotaped interview of Buchanan. She indicated that on February 27, 2003, she was in Whiteside's trailer and heard Kupsch talking on the phone. Kupsch stated that he needed to get $300 for his mother and "was going to whack Bill to get the money."

Buchanan said that she went to sleep and when she woke up, Kupsch, defendant, Zoda and Martin were inside the trailer. They left and went to defendant's home. They parked in the garage and a white pillowcase was taken out of the car. At one point, inside defendant's house, she saw blood on Kupsch's hands. She also saw blood on defendant's arms.

Buchanan stated that three days later, defendant and Zoda went back for the white pillowcase and "torched" it. Thereafter, Kupsch got a swastika and two M's tattooed on the back of his neck. The tattoo meant that Kupsch had killed someone of a different race.

Three to four days after the incident, Kupsch told Buchanan that he killed Whiteside by putting Whiteside in the back of Whiteside's car and "beat[ing] the hell out of him." Defendant gave her the details of the incident, including the beating, arson, and getting money from the ATM using Whiteside's bank card. He said that he killed Whiteside because he never liked him, Whiteside yelled at his mother, Whiteside was of the "opposite race" and Kupsch was a skinhead. Buchanan also recounted details of the phone conversation Kupsch had with his mother.

Martin's car was searched on an unspecified date. Inside, police found a red plastic gasoline can, similar to the one Zoda had reported seeing on the night of Whiteside's death. Whiteside's blood was found on the shoes Zoda was wearing at the time of his arrest. A shoe box matching the shoes was found by the police in Kupsch's bedroom in Whiteside's trailer.

At trial, Buchanan claimed memory loss.[6] Her audiotaped statement was played for the jury. Buchanan claimed that she had been high on methamphetamine during the interview and had been fed information by sheriff's deputies. Deputy Sheriff Danny Smith, who interviewed Buchanan, denied giving Buchanan information and opined that she was not under the influence during the interview.

Zoda was 14 years old in February 2003 and lived in the Friendly Village Trailer Park in Lancaster. He knew Kupsch, his mother, Martin, and had met defendant through Kupsch's girlfriend, Buchanan, and other friends. He had known Casey since he was eight and had a very close relationship with him. He came to share Casey's views on White supremacy and considered himself a Neo-Nazi when he was 13. He pled guilty to murder in exchange for a reduced sentence. His testimony included the preparation for the murder, including the discussion at Martin's trailer, the facts relating to the murder of Whiteside, and the disposal of the clothing.

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[6] At trial in 2009, she was given immunity and testified she could not remember the events of 2003.

Casey testified in exchange for favorable treatment related to his own criminal behavior. Casey founded Metal Mindz, a White supremacist gang, when he was 12 or 13. He had "MM" tattooed on his body and the back of his head, as well as four swastikas. Kupsch shared his racist beliefs but was not a member of Metal Mindz. Casey testified that Kupsch told him that he, Zoda and defendant all participated in beating Whiteside to death. Casey also indicated that he was present when Kupsch withdrew money from Whiteside's account.

Smith also testified in exchange for favorable treatment related to his own criminal behavior. Smith knew Martin, Kupsch and Whiteside, and had met defendant through Casey. He was a drug dealer and one of Martin's sources for methamphetamine. Smith testified that he was with Zoda and Kupsch when they threw the clothing into the dumpster and burned it. Smith also said that Kupsch told him that he beat and burned Whiteside to death and that defendant was accidently burned when they lit the car on fire.

Michelle Seevers (Seevers), who had a romantic relationship with defendant, testified that defendant and Kupsch were together when she last saw them on the evening of February 27, 2003. Defendant had burns on his right hand and left shin, but she did not know how he got them. Seevers stated that she saw Kupsch about two weeks later at a Motel 6 with Casey, Buchanan, King and Smith. Kupsch showed her a tattoo of "MM" on the back of his neck. He said he had earned his "M's" and that it was for being initiated into Metal Mindz.

Jennifer Daggs (Daggs), whose husband was Kupsch's cousin, testified that Kupsch showed up at her home around midnight in March 2003, with a girl named Jessica. Kupsch said that he had "whacked somebody." He also mentioned a $300 drug debt a few days earlier. Daggs denied telling the police that Kupsch said he killed his mother's boyfriend because she needed money.

B. ***Defense***

On May 28, 2005, Smith was handcuffed during an investigation of a traffic accident. Smith used racial slurs, physically resisted the officers, and directed his girlfriend to contact the sheriff's deputy for whom he was working as an informant.

Gordon Plotkin, M.D., testified for Martin as to the effects of methamphetamine. He opined that Martin was addicted to methamphetamine and explained that although methamphetamine could improve memory, it could cause hallucinations.

DISCUSSION

A. ***Admission of Kupsch's Statements***

Defendant contends that the trial court erred in admitting statements Kupsch made to Buchanan, Casey and Smith. We disagree.

Defendant contends that evidence of Kupsch's statements was inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] because they were out-of-court statements implicating defendant, and he was not able to cross-examine Kupsch, violating his Sixth Amendment Confrontation Clause right. However, the Confrontation Clause is violated only by the admission of testimonial hearsay statements. (*People v. Loy* (2011) 52 Cal.4th 46, 66.) Kupsch's statements were casual remarks made to friends and were not testimonial under *Crawford*. (See, e.g., *Loy*, *supra*, at pp. 66-67.)

The recent case of *People v. Arceo* (2011) 195 Cal.App.4th 556 from Division Eight of this district is instructive. In *Arceo*, the defendant's objection to statements as a violation of his Sixth Amendment confrontation rights was rejected by the court. Specifically, the defendant sought to exclude three sets of statements by nontestifying codefendants that implicated the defendant in murders. The defendant claimed that the statements were inadmissible under *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] and *People v. Aranda* (1965) 63 Cal.2d 518. The *Arceo* court clearly explained: "[T]he confrontation clause has no application to out-of-court

nontestimonial statements (*Whorton v. Bockting* (2007) 549 U.S. 406, 420 [167 L.Ed.2d 1, 127 S.Ct. 1173] . . . ; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812 . . .), including statements by codefendants. ([*United States*] *v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 . . . [*Bruton* must be viewed 'through the lens of *Crawford* and *Davis*'; if the challenged statement is not testimonial, the confrontation clause has no application]; see also [*United States*] *v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 ['[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to non-testimonial statements'].)" (*Arceo, supra,* at p. 571, footnote omitted.)

In *People v. Cervantes* (2004) 118 Cal.App.4th 162, the court held that when it was not reasonably anticipated that a statement would be used at trial, the statement was not "testimonial" within the meaning of *Crawford*. (*Cervantes, supra,* at p. 174.) Clearly, when the statements were made by Kupsch in the instant case, they were not made with the anticipation that they would be used at trial. Thus, there was no *Crawford* violation.

Defendant also submits that the statements were inadmissible because they were not reliable, in that Kupsch was under the influence of methamphetamine when he made the statements concerning what he and defendant had done. Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

It is undisputed that Kupsch was unavailable, and his statements were clearly against his penal interest. The statements would clearly be admissible pursuant to Evidence Code section 1230 if the statements were sufficiently trustworthy. While there

was substantial evidence that Kupsch had used methamphetamine and received little sleep at the time he made the statements, there was evidence that points to the credibility of the statements. The crime was committed in a systematic manner, including seeking help in finding a remote area to kill the victim, disposing of the clothing, locating and withdrawing money from ATMs. In addition, the expert called by the defense acknowledged that ingesting methamphetamine could possibly improve memory. The trial court was entitled to conclude that the totality of the circumstances indicated that the statements made by Kupsch, although made while under the influence of drugs, were trustworthy and admissible.

Even if the evidence was improperly admitted, its admission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [erroneous admission of statements by a non-testifying codefendant in violation of *Bruton v. United States*, *supra*, 391 U.S. 123]; see also *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [evidence admitted in violation of Evidence Code section 1230 analyzed under harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

In arguing prejudicial error, defendant contends that the prosecution case was built on Zoda's accomplice testimony and on the testimony of three non-accomplices, Buchanan, Casey and Smith, all of whom were less than ideal witnesses. The testimony of the three non-accomplices was based on Kupsch's statements to them, and their testimony was critical in corroborating Zoda's testimony. Therefore, defendant concludes, admission of Kupsch's statements cannot be shown harmless beyond a reasonable doubt.

However, there was much more than the testimony of the three non-accomplices as to Kupsch's statements that corroborated Zoda's testimony. Whiteside's blood was on the shoes Zoda was wearing at the time of his arrest, and there was evidence connecting those shoes to Kupsch. Phone records confirmed the timing of the murder, a bank photograph showed Kupsch withdrawing money at an ATM from Whiteside's account,

and the gasoline can was found in Martin's car. There was evidence of Kupsch's tattoos obtained after the murder, and evidence that after the murder, Kupsch hid at a motel.

Even ignoring Kupsch's statements, there is convincing evidence that defendant participated in the murders. Zoda testified as to defendant's participation in the murder and robbery. Numerous witnesses saw defendant with Zoda and Kupsch shortly before and after the murder. Defendant suffered burns during the murder and admitted to Buchanan that he was burned when Kupsch started the fire. With a wealth of corroborating evidence, including the physical evidence, any error in admitting Kupsch's statements was harmless beyond a reasonable doubt.

B. ***Admission of Evidence of Racist Gangs***

Defendant contends that the trial court erred in admitting evidence of racist gangs where no gang or hate crime allegation was filed, the evidence was not "other act" evidence under Evidence Code section 1101, subdivision (b), and the prejudice exceeded the probative value. We disagree.

Initially, defendant contends the trial court erred in allowing gang evidence under Evidence Code section 1101, subdivision (b), in order to show intent and motive. Evidence Code section 1101, subdivision (a), prohibits, with specified exceptions, admission of "evidence of a person's character . . . (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Subdivision (b) of Evidence Code section 1101 provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Gang evidence is not admissible when its only purpose is to prove defendant's criminal disposition or bad character in order to create an inference defendant committed the charged offenses. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; accord, Evid. Code, § 1101, subd. (a).)

Here, the evidence was properly admitted to show that defendant and his companions committed the crimes in order to obtain money from the Whiteside, in part because of their dislike of non-Whites. The evidence was probative to establish motive and identity. The evidence clearly showed that the individuals involved and the witnesses shared similar racist beliefs. Hence, the evidence was admissible under Evidence Code section 1101, subdivision (b).

Defendant also contends that the trial court abused its discretion in admitting the evidence, because the gang evidence was so prejudicial as to result in a violation of his federal constitution right to due process. In analyzing this contention, we start with the basic principle that only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) We review the trial court's determination as to admissibility that turns on relevance for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Evidence Code section 352 gives the trial court the discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) We will not disturb the trial court's exercise of its discretion on appeal unless the court has abused its discretion (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070), i.e., if its decision exceeds the bounds of reason (*DeSantis, supra*, at p. 1226).

As with any other evidence, we review the trial court's decision to admit evidence pertaining to gangs and gang membership for an abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Waidla, supra*, 22 Cal.4th at p. 717.) Gang evidence clearly has a potential for prejudice. (*Carter, supra,* at p. 1194; *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 223.) When it meets the test of relevancy,

however, it is admissible unless its prejudicial effect clearly outweighs its probative value. (*Carter, supra*, at p. 1194; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.)

The trial court properly admits gang evidence when it is relevant to a material issue at trial. As the California Supreme court has stated, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

The case of *People v. Bivert* (2011) 52 Cal.4th 96 supports the trial court's exercise of its discretion in allowing the gang evidence. In *Bivert*, evidence was admitted that the defendant told people it was important to kill undesirable White people to strengthen the White race. (*Id*. at pp. 103, 106, 116.) As in the instant case, there was no hate crime or gang enhancement alleged. (*Id*. at p. 101.) On appeal, the defendant contended that the evidence should have been excluded because his primary motive had been to kill child molesters and because the evidence of his racist beliefs was likely to prejudice the jury against him. The Supreme Court rejected his contention. Even if there were other reasons for the defendant's crimes, the fact that the evidence "revealed defendant to be a racist did not render it inadmissible. Evidence tending to prove defendant was a eugenicist who favored the supposed purity of the White race also tended to prove his motive and intent to assault and kill individuals he deemed to be acting in ways contrary to his ideal." (*Id*. at p. 117.)

Similarly here, the evidence showed that while defendant, Kupsch and Zoda's main motive in killing Whiteside was to obtain money to help pay Martin's drug debt, there also was evidence that they wanted to kill him because of his race; he was half Black and half Native American. The racist beliefs in part explained why the individuals involved would commit such a brutal crime for a small sum of money. After the murder, Kupsch got new tattoos, including a swastika, to evidence the crime. The fact that the

other individuals, including Buchanan, King, Casey and Smith did not react differently when they learned of the murder, can be explained in part by their racist beliefs. The evidence was highly probative, and the trial court did not abuse its discretion in finding its probative value outweighed its prejudicial impact. (*People v. Bivert, supra,* 52 Cal.4th at p. 117; *People v. Carter, supra,* 30 Cal.4th at p. 1194.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.